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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. JAMES MORRIS, Defendant and Appellant.	C058388 (Super. Ct. No. 05F11542)

Either codefendant Carline Balbuena, whose self-chosen rummy name was "Queen of the Damned," or defendant James Morris, aka "Ultimate Evil," delivered the fatal blows to Balbuena's three-year-old son, Keith Carl Balbuena (KC). The jury convicted them both of murder, but we cannot ascertain from the verdicts who perpetrated and who aided and abetted the murder, particularly in light of overwhelming evidence that either or

both abused the child over a long period of time, and either or both of them could have caused his tragic death.

In this appeal, Morris tries to distance himself from the facts. He does not challenge the sufficiency of the evidence that he was either the perpetrator or the aider and abettor. Rather, while distracting our attention from the foreseeability, indeed the inevitability, of this little boy's death under the circumstances, he launches an assault on the jury instructions that allowed the jury to convict him of murder as a natural and probable consequence of aiding and abetting felony child abuse. We conclude his appeal on this ground has no merit because (1) an inherently dangerous felony for felony murder purposes bears no relation to a target offense for purposes of the natural and probable consequences doctrine, and (2) *People v. Culuko* (2000) 78 Cal.App.4th 307 (*Culuko*) is factually similar, legally sound, and disposes of most of the arguments raised in this appeal.

Furthermore, we conclude the trial court did not deprive Morris of a fair trial by allowing the prosecutor to wear a small cross, nor did it abuse its discretion by denying the motion for a new trial based on testimony by a convicted murderer that was not of a nature to render a different result probable on retrial. We affirm.

FACTS

By 8:00 p.m. on November 18, 2005, three-year-old KC was brain dead. A day earlier, paramedics observed severe bruising on his head, torso, chest, pelvis, and leg. The child was

unresponsive. The emergency room doctor believed KC had been assaulted as he had a large amount of blood between his brain and his skull, pushing the brain to one side; a large amount of fluid in his abdomen; and a possible liver laceration. It appeared his kidneys had not been functioning normally for at least 24 to 48 hours. He also had a healing burn injury on the sole of his foot.

A surgeon drilled a hole in KC's skull and removed a bone to evacuate blood and relieve the pressure. Retinal hemorrhages in his right eye suggested his head had been shaken and hit very hard against a surface. According to a pediatrician specializing in child abuse, these injuries could not have been sustained from falling from a crib or other household fall; they would require "very significant force" generally associated with falls from major heights or motor vehicle accidents. In his expert opinion, the injuries, including those to KC's abdomen, were intentionally inflicted and the result of abuse.

The pathologist opined that the cause of death was blunt force injuries to the head, torso, and abdomen. If the head injury had not killed KC, the abdominal injuries would have. The discoloration along his cheek and lower border of one eye was consistent with having been struck in the eye and was not typical of a fall. Bruising was extensive, including a bruise on his forehead, three bruises on his chest, a bruise on the front of the left leg, a cluster of bruises on the inside of the left knee, a bruise on the top of his left foot, a bruise on the instep of the left foot, a bruise on the back of his right

ankle, two bruises on his left arm, a bruise on his right forearm, a bruise in the muscle of his left buttock, and bruises on his right upper thigh and left hip. The force required to sustain the abdominal injury would have been a "kick or punch that goes up . . . into the belly." The pathologist did not believe the administration of CPR could have caused the abdominal injury. A child who had sustained these abdominal injuries would have had symptoms including nausea, vomiting, pain, and listlessness.

The emergency personnel were not the first to observe evidence of abuse. Morris and his three-year-old daughter, H., moved into Balbuena's apartment in August 2005 to share expenses. Balbuena, with the help of a child care subsidy, enrolled her two children, KC and his one-year-old sister, A., in the same preschool H. attended. The director noted that KC's speech was delayed and A. did not move around like a child her age should. In October, KC's teacher and an assistant director saw bruising, inflammation, and scratches on the right side of his eye and ear and reported the injury to child protective services (CPS). CPS investigated the cause of the injury, but both Balbuena and Morris denied using physical punishment or knowing how he received the injury.

Later that month Morris pointed out to the preschool director that KC had burned his foot. Morris told the director he did not want her to "think that [he] did it." According to the director, the foot looked "charred," and since the injury had received no medical attention, she told Morris to take KC to

the hospital for treatment. Again she reported the injury to CPS. KC had a third-degree burn that penetrated the dermis and destroyed the nerves. The injury had occurred two days earlier and the surrounding tissue had become infected. About a week later, KC complained to the preschool's assistant director that his foot hurt. She removed his shoe and sock and saw the foot was no longer bandaged and was bloody. Balbuena withdrew the children from the preschool on November 8 because her day care subsidy was terminated.

From November 8 until November 17, KC was in the exclusive care and custody of Balbuena and Morris. They left three-year-old KC and fifteen-month-old A. alone in the apartment for periods of time while they went to work at a company located a few minutes from their apartment. They would also take turns coming home and taking care of the children for some of the workday. Life in the apartment by that time had become exceedingly stressful.

It would be an understatement to say that Balbuena cared more about men and their drugs than she did her children. Already a methamphetamine user, she became a drug dealer to support her husband Noel's expensive habit. She slept with her supplier and told him he had fathered her second child. She stole rents from a property she was managing for her mother because she and Noel could not pay their rent, and when Noel left her and she was evicted from her apartment, she lived with friends, eventually in a car with her children, and then moved to Sacramento. Nevertheless, she desired a relationship with

Morris and was willing to pay for his marijuana and for much more than her share of the housing and food costs, give him massages, do his laundry, and to provide him with access to her car and cell phone.

Yet, according to Balbuena at trial, Morris was always angry. He did not think that she disciplined her children, and he was particularly annoyed with KC and the lack of progress he was making with toilet training. She described at great length and in disgusting detail how he physically disciplined KC, including forcing him to eat his own feces. She explained that for the first time she also started spanking KC to placate Morris and to keep him from inflicting more severe punishment on the child. She testified she had seen Morris punch KC in the stomach on one occasion. With respect to KC's burned foot, Morris told her he had run a comb down the bottom of his foot while the skin was soft from a bath and the skin had peeled off. Morris justified the injury as punishment because KC had not jumped up and down as instructed. Balbuena also testified that Morris had hit KC on the side of the head, causing the injuries to his ear that had been reported to CPS.

Balbuena's testimony at trial, however, was at odds with a confession she gave three weeks after KC died, during which she claimed sole responsibility for his death. She confessed that she had been smoking methamphetamine, without Morris's knowledge, which made her feel "numb and stuff." She described how she became extremely angry after coming home for lunch on November 16 because KC vomited the Skittles she had given him as

a reward for finishing his chicken nuggets and she was forced to clean it up. She claimed she was so angry she hit his head about 20 to 30 times in 30 minutes. She believed he got a bruise on his leg when she pushed him into the metal railing on his bed, and a black eye when she threw a plastic container of wipes at him.

Balbuena told her interrogator that she probably gave KC the fatal blow later that evening. According to this version, after work she was exasperated because KC had not taken a nap as planned. She dragged him out of bed and hit him against the wall. Enraged because he would not jump up and down in the way she demanded, she started spanking him. She enlisted Morris's help and he hit KC three times with a metal spatula. Finally, she made KC stand in the corner, but when he turned around, she pushed his face against the wall and hit him so hard it made a "huge sound" and his head bounced off the wall.

Morris gave a statement after KC was hospitalized but before he died. He assumed responsibility for KC's condition because he had placed him in the crib and he believed KC had fallen while climbing out of the crib. He admitted he made KC jump up and down for up to 30 minutes to punish him for various transgressions. In the late afternoon on November 16, KC fell and hit his eye while doing jumping jacks. Morris told KC to take a nap when he left to pick up Balbuena from work, but when they returned, KC was still awake, so he made him stand with his arms outstretched for another 30 minutes. Later that evening, KC vomited. Morris put him to bed in another room so he and

Balbuena could watch a movie. The following morning, Morris found KC in the bathroom, coughing and wheezing. He put KC back to bed but not long after got him up again and took him back to the bathroom. He told KC to stand up straight, but the toddler's knees buckled and he fell to the floor. Morris said KC appeared to be choking and his breathing was very shallow. Hysterical, Balbuena called 911, and according to Morris, he tried to administer CPR. He was afraid he had hurt KC trying to give him CPR.

An expert for the defense agreed with the pathologist that head trauma was the cause of death and the death appeared to be a homicide. He opined, however, that the injury to KC's eye could have been caused by a fall, and he had not sustained significant injuries to the abdomen. Nor did he find the liver had been lacerated.

Morris's sister testified that Balbuena had told her she had once thrown KC across the room. Another witness testified that Balbuena had told him she had been forced to become involved in the murder of her child.

DISCUSSION

I

It is true that the verdicts do not disclose whether Morris was found guilty of second degree murder as the perpetrator of the fatal blows to KC or as the aider and abettor to his codefendant. Indeed, the jurors were not required to agree what his role had been. Thus, we must consider whether the instructions on aiding and abetting, including the natural and

probable consequences of felony child abuse, are infirm. We begin with a summary of the basic principles governing the criminal liability of aiders and abettors for crimes they may not have intended, but which are the natural and probable consequences of the target crimes they aided and abetted.

An aider and abettor is a person who, "acting with (1) knowledge of the unlawful purpose of the perpetrator; and (2) the intent or purpose of committing, encouraging, or facilitating the commission of the offense, (3) by act or advice aids, promotes, encourages or instigates, the commission of the crime." (*People v. Beeman* (1984) 35 Cal.3d 547, 561 (*Beeman*).) The difficult cases involve the aider and abettor who assists or encourages the perpetrator to commit one crime, but the perpetrator commits another. Under those circumstances, prosecutors often rely on the natural and probable consequences doctrine.

An aider and abettor is "guilty not only of the offense he intended to facilitate or encourage, but also of any reasonably foreseeable offense committed by the person he aids and abets. . . . [¶] It follows that a defendant whose liability is predicated on his status as an aider and abettor need not have intended to encourage or facilitate the particular offense ultimately committed by the perpetrator. His knowledge that an act which is criminal was intended, and his action taken with the intent that the act be encouraged or facilitated, are sufficient to impose liability on him for any reasonably foreseeable offense committed as a consequence by the

perpetrator. It is the intent to encourage and bring about conduct that is criminal, not the specific intent that is an element of the target offense, which . . . must be found by the jury." (*People v. Croy* (1985) 41 Cal.3d 1, 12, fn. 5.)

In *People v. Prettyman* (1996) 14 Cal.4th 248 (*Prettyman*), the Supreme Court reaffirmed the three factors necessary to find that a person was an aider and abettor as first enunciated in *Beeman*, *supra*, 35 Cal.3d 547, and added an additional two factors when the particular facts trigger application of the natural and probable consequences doctrine. The Supreme Court held that the trier of fact must also find that "(4) the defendant's confederate committed an offense *other than* the target crime; and (5) the offense committed by the confederate was a natural and probable consequence of the target crime that the defendant aided and abetted." (*Id.* at p. 262, fn. omitted.) The trial court instructed the jury in accordance with these general principles and identified the crime of inflicting physical punishment on a child or felony child abuse as the target crimes Morris aided and abetted. (CALCRIM No. 403.)

"Another theory that you may consider in evaluating whether the defendant is guilty of murder or assault on a child resulting in death as charged in Counts I & II, is the natural and probable consequences doctrine of aiding and abetting.

"Before you may decide whether the defendant is guilty of murder or assault on a child resulting in death under this theory, you must first decide whether he or she is guilty of inflicting physical punishment on a child or felony child abuse.

"To prove that the defendant is guilty of murder, or the lesser offense of involuntary manslaughter, or assault on a child resulting in death under this theory, the People must prove beyond a reasonable doubt that:

"1. The crime of inflicting physical punishment on a child, in violation of Penal Code section 273d(a), or felony child abuse in violation of Penal Code section 273a(a) was committed;

"2. The defendant aided and abetted that crime;

"3. A coparticipant, during the commission of that target crime of inflicting physical punishment on a child (PC 273d(a)) or felony child abuse (PC 273a(a)), committed the charged crime of murder or the lesser crime of involuntary manslaughter, or assault on a child resulting in death;

"AND

"4. The commission of the crime of murder, or the lesser offense of involuntary manslaughter, or assault on a child resulting in death was a natural and probable consequence of the commission of the infliction of physical punishment on a child or felony child abuse.

"A *coparticipant* in a crime is the perpetrator or anyone who aided and abetted the perpetrator. It does not include a victim or innocent bystander.

"A *natural and probable consequence* is one that a reasonable person would know is likely to happen if nothing unusual intervenes. In deciding whether a consequence is natural and probable, consider all of the circumstances

established by the evidence. If the murder, or the lesser offense of involuntary manslaughter, or the assault on a child resulting in death was committed for a reason independent of the common plan to commit the infliction of physical punishment on a child or felony child abuse, then the commission of murder or the lesser offense of involuntary manslaughter, or assault on a child resulting in death was not a natural and probable consequence of infliction of physical punishment on a child or felony child abuse.

"To decide whether [the] crime of murder or the lesser offense of involuntary manslaughter, or assault on a child resulting in death was committed, please refer to the separate instructions that I will give or have given you on those crimes.

"The People are alleging that the defendant originally intended to aid and abet either inflicting physical punishment on a child or felony child abuse.

"The defendant is guilty of murder or the lesser offense of involuntary manslaughter, or assault on a child resulting in death, if you decide that the defendant aided and abetted one of these crimes and that murder or the lesser offense of involuntary manslaughter or assault on a child resulting in death was the natural and probable result of one of these crimes. However, you do not need to agree about which of these two crimes the defendant aided and abetted.

"In determining whether a consequence is natural and probable, you must apply an objective test, based not on what the defendant actually intended, but on what a person of

reasonable and ordinary prudence would have expected was likely to occur." (See CALCRIM No. 403.)

Morris challenges the jury instructions on the natural and probable consequences doctrine on multiple grounds. Nearly all of his arguments were raised and rejected in *Culuko*, *supra*, 78 Cal.App.4th 307, a seminal case that disposes of most of the issues before us. Before turning to the issues resolved by *Culuko*, however, we must first address the false premise and the false analogy upon which this appeal is predicated.

A. Target Crime v. Inherently Dangerous Felony

Morris contends it was error to instruct the jurors they could find him guilty of either murder or assault on a child under the age of eight as a natural and probable consequence of inflicting physical punishment on a child. Neither murder nor assault on a child under eight, in Morris's view, is a reasonably foreseeable consequence of inflicting punishment as a matter of law. He analogizes the predicate or target offense to the unrelated concept of an inherently dangerous felony for felony murder purposes. We begin with the false premise and then consider the false analogy.

The false premise, as aptly pointed out by the Attorney General, is that the foreseeability of the commission of one criminal offense as a result of the commission of another is not an abstract question of law. Morris does not cite, and we have not found, any authority for the proposition that any particular target offense can never trigger the natural and probable consequences doctrine as a matter of law. The law, in fact, is

to the contrary. Whether the crime charged is the natural and probable consequence of the target crime is a factual question for the jury to decide. (*People v. Cummins* (2005) 127 Cal.App.4th 667, 677; *People v. Olguin* (1994) 31 Cal.App.4th 1355, 1376; *People v. Nguyen* (1993) 21 Cal.App.4th 518, 530 (*Nguyen*); *People v. Godinez* (1992) 2 Cal.App.4th 492, 499.)

In *Nguyen*, *supra*, 21 Cal.App.4th 518, we were quite direct that the determination whether a particular crime is a natural and probable consequence of another crime aided and abetted was not to be considered in the abstract as a question of law. (*Id.* at p. 531.) Justice Sparks further explained: "Rather, the issue is a factual question to be resolved by the jury in light of all of the circumstances surrounding the incident. [Citations.] Consequently, the issue does not turn on the defendant's subjective state of mind, but depends upon whether, under all of the circumstances presented, a reasonable person in the defendant's position would have or should have known that the charged offense was a reasonably foreseeable consequence of the act aided and abetted by the defendant." (*Ibid.*) We agree with the Attorney General that it is not the law that the charged offense must be reasonably foreseeable based on the bare elements of the target offenses aided and abetted, a mere abstraction to be sure.

Morris diverts our attention from the factual circumstances presented and into the analytic thicket of the absurd -- where felony child endangerment, in the abstract, is not inherently dangerous to human life. (*People v. Lee* (1991) 234 Cal.App.3d

1214, 1219; *People v. Caffero* (1989) 207 Cal.App.3d 678, 683-684.) He analogizes his target offense under the natural and probable consequences doctrine to an inherently dangerous felony for purposes of the felony-murder rule with the hope of persuading us that it is not reasonable to say that one who aids and abets cruel or inhuman punishment on a child that causes a traumatic physical condition should foresee that the perpetrator might kill the child. Divorced from the disturbing factual circumstances before us, Morris urges us to consider that the crime could be committed even when the traumatic condition is somewhat minor. Since such a crime could not support a felony murder theory of liability because it might be committed in a manner that was not life threatening, Morris concludes it cannot be used as a target offense under the natural and probable consequences doctrine. He erroneously blurs two distinct and unrelated concepts.

The natural and probable consequences doctrine is not, as Morris suggests, a substitute for malice. Malice remains an essential element even when the natural and probable consequences doctrine applies, but the perpetrator, not the aider and abettor, must entertain malice toward the victim. Felony murder, on the other hand, allows the prosecution to utilize the commission of an inherently dangerous felony as a substitute for malice. Thus, an entire body of law has evolved around the counterintuitive notion that many inherently dangerous felonies are not, in the abstract, inherently dangerous to human life. We need not weigh in on the evolution

of this branch of the law since the prosecutor did not argue felony murder and the jurors were not instructed on felony murder. Simply put, a target offense for purposes of the natural and probable consequences doctrine is not analogous to an inherently dangerous felony under the felony-murder rule, and there is no reason to import the odd legal gymnastics surrounding the abstract distinctions between inherently dangerous felonies from felony murder into the natural and probable consequences doctrine.

That is not to say that murder or assault on a child under the age of eight causing death is always a reasonably foreseeable consequence of child abuse in its various forms. The Supreme Court in *Prettyman* made it clear that murder is "*not* the 'natural and probable consequence' of 'trivial' activities." (*Prettyman*, *supra*, 14 Cal.4th at p. 269.) As the court admonished, "To trigger application of the 'natural and probable consequences' doctrine, there must be a close connection between the target crime aided and abetted and the offense actually committed." (*Ibid*.)

Since Morris does not challenge the sufficiency of the evidence, the question is not whether the abuse in this case was trivial or whether there was the requisite close connection between the abuse and the murder. Rather, the issue is whether the jury instructions were proper because they allowed the jury to decide whether, under all of the circumstances, murder or assault on a child under eight causing death was reasonably foreseeable as a result of the acts of abuse Morris aided and

abetted. We conclude that the instructions were proper because the question was one of fact, not law, and they did not remove the essential element of finding malice from the jury. Thus, there was no need to consider whether the target offenses were inherently dangerous.

B. *People v. Culuko*

The facts of *Culuko* are eerily similar to those before us. As here, defendant Leslie Eugene Garcia moved in with the child victim's mother a couple of months before the murder. (*Culuko*, *supra*, 78 Cal.App.4th at p. 317.) As here, either Garcia or the mother was the perpetrator. (*Id.* at p. 313.) In *Culuko*, one of them hit seven-month-old Joey Galindo, Jr., so hard in the stomach that it ruptured an artery in the back of his abdomen, and he died of internal bleeding. (*Ibid.*) As here, at various earlier times someone had severely abused the baby, and there was evidence of broken ribs, a broken leg, a smashed face, and bleeding in the brain. (*Ibid.*) Both mothers admitted having used methamphetamine. (*Id.* at p. 316.) Garcia's drug of choice appears to also have been methamphetamine (*id.* at p. 317); Morris's was marijuana.

Despite the factual similarities, Morris attempts to distinguish *Culuko*. He contends that because the jury in his case had the option to find he inflicted physical punishment on a child in addition to the offense of felony child endangerment as charged in *Culuko*, neither the rationale nor the holding applies here. In his view, since endangerment must be under "circumstances or conditions likely to produce great bodily

harm" and the willful infliction of cruel and unusual punishment or injury on a child need not be under such dire circumstances, it is not reasonably foreseeable that a person who inflicts a "traumatic physical condition" might also kill the child.

Morris's attempt to distinguish *Culuko* is nothing but a recycled version of his argument that murder is not a reasonably foreseeable consequence of felony child abuse as a matter of law. Certainly murder is not a reasonably foreseeable consequence of many acts of child abuse, including, as Morris points out, disciplining that results in a small bruise. But those were not the facts in *Culuko*, nor do they approximate the quality or quantity of the abuse inflicted on KC. The question is not whether there is a hypothetical in which murder is not a foreseeable consequence of inflicting physical punishment, but whether under all the circumstances presented in this case, a person in Morris's position would have reasonably foreseen that Balbuena's abuse of KC would lead to his death. *Culuko* is right on point, both factually and legally.

Morris raises two additional issues resolved against him in *Culuko*. First, he complains the jury may have convicted him of murder without finding that either he or Balbuena harbored malice. If so, he posits, an essential element of murder is missing and a new crime created.

As *Culuko* reminds us, the Supreme Court has repeatedly "rejected the contention that an instruction on the natural and probable consequences doctrine is erroneous because it permits an aider and abettor to be found guilty of murder without

malice." (*Culuko*, *supra*, 78 Cal.App.4th at p. 322.) In *People v. Richardson* (2008) 43 Cal.4th 959, the court again confirmed: "[W]e have previously rejected the argument, advanced by defendant here, that the natural and probable consequences doctrine unconstitutionally presumes malice on the part of the aider and abettor." (*Id.* at p. 1021.) Thus, there is no merit in Morris's contention that the instructions removed a required element of the crime of murder, that the jury in essence created a new crime, and that the instructions on the natural and probable consequences doctrine constituted federal constitutional error.

The jury was also instructed: "Those who aid and abet a crime and those who directly perpetrate the crime are principals and equally guilty of the commission of that crime. You need not unanimously agree, nor individually determine, whether a defendant is an aider or abettor or a direct perpetrator. The individual jurors themselves need not choose among the theories, so long as each is convinced of guilt. You may have a reasonable doubt that the defendant was the direct perpetrator, and a similar doubt that he or she was the aider and abettor, but no such doubt that he or she was one or the other."

The court in *Culuko* upheld the validity of such an "either/or" instruction and emphasized that despite the instruction, "the jury *did* have to find that some defendant harbored malice." (*Culuko*, *supra*, 78 Cal.App.4th at p. 323.) The court explained: "The 'either/or' instruction was a correct statement of law. It derived from cases holding the jury need

not agree unanimously on whether the defendant was the perpetrator or the aider and abettor, and, accordingly, the trial court need not instruct the jury to agree unanimously on this." (*Ibid.*) Moreover, the court in *Culuko* reminded the defendant the instruction was based on binding Supreme Court precedent.

"'It is well settled that, to properly convict, a jury must unanimously agree that the defendant is guilty of the statutory offense of first degree murder beyond a reasonable doubt, but it need not decide which of several proferred theories of first degree murder liability governs the case.' (*People v. Lewis* (2001) 25 Cal.4th 610, 654 [].) Thus, the judge need not decide unanimously whether a defendant was a direct perpetrator or an aider and abettor, so long as it is unanimous that he was one or the other." (*People v. Wilson* (2008) 44 Cal.4th 758, 801-802.)

Second, Morris, like the defendants in *Culuko*, alleges the instructions allowed the jury to apply the natural and probable consequences doctrine to a crime, rather than to a specific act. Morris contends the instructions are particularly problematic for a course of conduct crime such as felony child abuse because the target "crime" consists of a series of discrete "acts." In these circumstances, Morris insists the jury should have been instructed to identify each act of felony abuse, to determine if he aided and abetted each act if he did not perpetrate it, and then to determine whether the murder was a natural and probable consequence of the act he aided and abetted.

Again, the court in *Culuko* rejected defendant's argument. The court wrote, "Defendants' instructional model suggests the aider and abettor must intend to facilitate the specific 'act' by which the perpetrator ultimately commits the intended crime. This is clearly not the law." (*Culuko*, *supra*, 78 Cal.App.4th at p. 326.) The court reiterated that the natural and probable consequences doctrine is triggered when the perpetrator commits a different or additional crime than the one the aider and abettor intended. The doctrine, however, does not turn on the aider and abettor's subjective intent but on whether, under all the circumstances, a reasonable person would have known that the charged offense was a reasonably foreseeable consequence of the act aided and abetted by the defendant. (*Id.* at p. 327.)

The instruction given in *Culuko*, as here, was adequate. In *Culuko*, "[i]t prevented the jurors from finding Culuko guilty of murder, merely because she aided and abetted Garcia's commission of felony child abuse, if it was unforeseeable that Garcia would commit murder as a result. At the same time, it *allowed* the jurors to find Culuko guilty of murder if she *did* aid and abet Garcia's commission of felony child abuse, if it *was* foreseeable that Garcia would commit murder as a result. Moreover, it did not erect an artificial requirement that Culuko had to intend and encourage Garcia to deliver the fatal punch to the abdomen. It could be sufficient that she intended and encouraged Garcia to brutalize the baby any way he chose, as long as murder was a foreseeable result." (*Culuko*, *supra*, 78 Cal.App.4th at p. 328.)

In the same way, the jurors, as instructed, could not have found Morris guilty of aiding and abetting the murder without finding the murder was a reasonably foreseeable consequence of an act of felony child abuse, which he aided and abetted. He was not entitled to an instruction requiring the jurors to identify or agree on an act of felony child abuse or whether either of them was an aider and abettor rather than the perpetrator; "a fortiori, they were not entitled to an instruction requiring the jurors to identify or agree on an act of aiding and abetting." (*Culuko*, *supra*, 78 Cal.App.4th at p. 329.)

Again borrowing from principles involving the inapposite felony murder rule, Morris argues that allowing felony child abuse to serve as a predicate crime allows the jurors to find murder in the absence of malice because the underlying felony, felony child abuse, is an integral part of the homicide. In other words, he contends the doctrine first articulated in *People v. Ireland* (1969) 70 Cal.2d 522 should be utilized here. We rejected the application of the *Ireland* merger concept to the natural and probable consequences doctrine in *People v. Karapetyan* (2006) 140 Cal.App.4th 1172, 1177-1178. We explained: "In *Ireland*, *supra*, 70 Cal.2d 522, the court held that felony-murder instructions were improper when they were based upon a felony that was an integral part of the homicide. To allow otherwise 'would effectively preclude the jury from considering the issue of malice aforethought in all cases wherein homicide has been committed as a result of a felonious

assault -- a category which includes the great majority of all homicides.' (*Id.* at p. 539.) Because a homicide generally results from the commission of an assault, every felonious assault ending in death would be elevated to murder, relieving the burden of the prosecutor to prove malice in most cases. [Citation.] This would frustrate the Legislature's intent to punish certain felonious assaults resulting in death more harshly than other assaults that happened to result in death but were committed without malice aforethought. [Citation.]" (*Karapetyan*, at pp. 1177-1178.)

II

The prosecutor wore a very thin, metallic cross measuring about an inch by one-half inch on a delicate chain. The trial judge observed that she would not have even noticed it if it had not been called to her attention. Morris claims the trial court deprived him of a fair trial by allowing the prosecutor to wear the cross. Although in a hypothetical case the constitutional issues could be grave, we conclude that on the record before us Morris's right to a fair trial has not been compromised. Nor do we find on these facts a violation of the establishment clause of the United States Constitution. (U.S. Const., 1st Amend.)

In refusing to compel the prosecutor to hide or discard the small cross, the court distinguished cases in which attorneys wore clerical collars and explained its rationale at some length as follows: "But, all three cases [cited by defendant] dealt with ordained priests wearing clerical collars while they were representing their clients. That is substantially different

than one of the attorneys wearing a very small cross, and to be truthful I would not have noticed the cross if it was not pointed out to me. It is silver, on a silver chain. It's very light in color. It's about maybe an inch lengthwise. Although the cross is historically a symbol of religion, [in] this day and age it can also be construed as a fashion statement. So, I do not see how it would in any way pose danger to imparing [*sic*] a fair trial process. It's a different thing if one of the parties had a huge volume of the Bible in front of them, or if the cross was much bigger, but the cross she is wearing is so small, an inch. Okay. Because I can't imagine it having the effect that the defense is arguing here on the jury psychologically, emotionally, consciously or subconscious[ly], or if that effect would even be transferred the motion [*sic*] that it be transferred to the witnesses I think is extremely farfetched. I understand [Evidence Code section] 789 bars getting into any of the witnesses['] religious beliefs. That's clearly not going to happen during this trial, but based on the cases that the defense has provided, I see a clear distinction, and I'm not going to order [the prosecutor] not to wear that cross. That's just something she does every day in her daily life, and I think her first amendment rights here outweigh any risk of danger of impairing [a] fair trial because I see no danger, unless there's another case you bring on point, more on point, I'm going to deny your motion."

We agree that cases involving clerical collars are of marginal utility. (See, e.g., *La Rocca v. Lane* (N.Y. 1975)

366 N.Y.S.2d 456.) As the trial court pointed out, clerical collars send a far different message than a small, hardly noticeable silver cross. The clerical collar connotes a special religious status conferred on only those who have achieved a prescribed stature and poses the danger that jurors might ascribe an authority or credibility to a person who has earned the collar. Thus, it is hardly surprising that courts would find the collar breaches the neutrality the Constitution demands.

Nor, however, do we find the cases cited by the Attorney General dispositive. While *Draper v. Logan County Pub. Library* (2003) 403 F.Supp.2d 608 (*Draper*) and *Nichol v. ARIN Intermediate Unit 28* (2003) 268 F.Supp.2d 536 (*Nichol*) both involve public employees wearing small crosses as the prosecutor did in this case, they were civil cases brought by the employees to vindicate their rights under the First Amendment to the United States Constitution (hereafter First Amendment). Neither case implicated a criminal defendant's right to a fair trial. The courts in both cases emphasized the importance of a public employee's right to free speech and the free exercise of his or her religion, but neither had to consider the important and countervailing right of a criminal defendant to a fair trial.

An appellate court in Texas, following the rationale of *Draper* and *Nichol*, did uphold a prosecutor's right to wear a one-inch cross, which the trial court had found was not "obvious or intrusive." (*Green v. Texas* (Tex. 2006) 209 S.W.3d 831, 833.) The trial judge, as here, had not observed the cross

prior to the defendant's raising the issue. The Court of Appeals commented that the establishment clause does not require the government to be hostile to religion and upheld the trial court's ruling allowing the prosecutor to wear the cross. (*Ibid.*)

We agree with defendant that the Constitution preserves the religious neutrality of the courtroom and it may be necessary to restrict some exercise of the First Amendment to avoid violating the establishment clause. (*Fox v. Los Angeles* (1978) 22 Cal.3d 792, 798.) We also believe that because the prosecutor is, in the eyes of the jurors, the personification of the state, we must be particularly sensitive to a defendant's claim that any religious adornments have the potential to cross the fuzzy line between the free exercise and establishment clauses of the First Amendment. A criminal defendant's right to a fair trial is an interest far stronger than that of the public employers in *Draper* and *Nichols* and one we must consider with extreme care and sensitivity.

Although we must consider the ultimate constitutional issue de novo (*Berry v. Department of Social Services* (9th Cir. 2006) 447 F.3d 642, 648), we must defer to the trial judge's factual assessment of the size and impact of the cross. She found that the cross was small in size and barely noticeable. She believed any message the cross might convey was ambiguous, as the slender silver cross could be construed equally as a fashion statement or as a religious symbol. Morris does not contest the factual findings of the trial court.

As a result, we do not believe the prosecutor's small cross compromised the fairness of the trial in this case, and we are unwilling to restrict a lawyer's First Amendment right to wear a small piece of jewelry the trial judge barely noticed and found unlikely to influence anyone who might have seen it.

For the same reasons, we reject Morris's argument that the prosecutor's cross interjected religion into the trial in violation of Evidence Code section 789. Section 789 provides: "Evidence of his religious belief or lack thereof is inadmissible to attack or support the credibility of a witness." Beyond the obvious distinction that the prosecutor was not a witness, we conclude that the mere wearing of a small cross, as described by the trial court in this case, was not a statement or opinion of the prosecutor's religious belief. Section 789 does not apply here.

III

Finally, Morris claims he was entitled to a new trial because one of his fellow inmates, a convicted murderer, was prepared to testify that Balbuena told him she intended to lie at trial and say that she believed Morris had forced KC to eat his own feces. We review the trial court's denial of the new trial motion based on newly discovered evidence for an abuse of discretion. (*People v. Earp* (1999) 20 Cal.4th 826, 890.)

In denying the motion, the court found that "it is not reasonably probable that a different result would have occurred. Ms. Balbuena's credibility was extremely suspect and attacked throughout the entire trial. [¶] Both counsel . . . impeached

her numerous times and argued she was not credible. She was an admitted liar. She gave two different versions entirely in court and to the detective, so already her credibility was much questioned and challenged, however, also the specific statement you referred to about Mr. Morris having forced the child to eat his own feces is one piece of a great amount of evidence in this case, so even if that one piece was challenged or negated, I do not find given the entirety of the evidence that it's probable a different result would have occurred, so based on that, I am going to deny your motion for a new trial."

It would be impossible on this record to conclude the trial court abused its discretion. As the trial court aptly pointed out, Balbuena was an unabashed liar. She confessed to abusing KC throughout the day he died and admitted that she had hit his head into the wall so hard she thought the blow could have caused his death. But at trial she repudiated her confession and blamed Morris for abusing KC. The newly discovered evidence did little more than confirm what the jurors already knew -- Balbuena lied. Thus, like the trial court, we conclude the inmate's testimony, if believed, was not of a nature to "render a different result probable on retrial." (*People v. Delgado* (1993) 5 Cal.4th 312, 328.) The evidence did not exonerate defendant; it simply reinforced that Balbuena, the witness, had little credibility. As a result, defendant is not entitled to a new trial.

DISPOSITION

The judgment is affirmed.

RAYE, J.

We concur:

SCOTLAND, P. J.

ROBIE, J.